Supreme Court, U.S.
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No. 96-292

In The

Supreme Court of the United States

October Term, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Idaho

JOINT APPENDIX

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CHRONOLOGICAL LISTING OF RELEVANT DATES

April 11, 1995	Civil Complaint and Demand for Jury Trial filed
April 25, 1995	First amended complaint filed
July 5, 1995	Defendants' Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6) and Motion for Award of Attorneys' Fees filed
July 5, 1995	Memorandum in Support of Defendants' Motion to Dismiss filed
December 1, 1995	Plaintiff's Response to Defendants' Motion to Dismiss filed
December 21, 1995	Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss filed
February 23, 1996	Order Denying Motion to Dismiss Except for Idaho State Liquor Dispensary entered
April 4, 1996	Notice of Appeal filed with trial court
April 23, 1996	Order that the Notice of Appeal is dismissed for the reason it is not from a final order or judgment entered
May 2, 1996	Defendants-Appellants' Petition for Rehearing from Order Dismissing Appeal and Memorandum Supporting Petition for Rehearing filed
May 23, 1996	Order Denying Petition for Rehearing from Order Dismissing Appeal entered and Appeal dismissed
May 23, 1996	Remittitur to the state trial court filed

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

Kristine L. Fankell, **Plaintiff,** **vs.** **Marian Johnson, Gordon Hubbard, Margo Edmiston, H. Dean Summers, John and Jane Does 1 - 10, each of them individually, and the Idaho State Liquor Dispensary,** **Defendants.**	**Case No.** CV-95-00529 **First Amended COMPLAINT and Demand for Jury Trial** (Filed April 25, 1995)

NATURE OF THE CASE

1. This is an action for the deprivation of the civil rights of the Plaintiff by the Defendant arising from her wrongful discharge from employment with the State of Idaho.

JURISDICTION

2. The District Court has concurrent jurisdiction with the Federal Courts to entertain actions brought pursuant to 42 U.S.C. §1983 and §1988 by virtue of *Maine v. Thiboutot*, 448 U.S. 1 (1980) and is therefore empowered to hear this case since the amount of damages are reasonably believed to be in excess of the Magistrate Court's jurisdictional amount under IRCP 82(c)(2)(A).

PARTIES

3. The Plaintiff, Kristine L. Fankell, is an adult, female citizen of the State of Idaho, at all times relating to the Complaint, living in Sandpoint, Idaho. She is a former, long time employee of the State of Idaho employed by the Idaho State Liquor Dispensary pursuant to I. C. §23-207(b).

4. The Defendant, Marian Johnson, is an individual, adult, female citizen of the State of Idaho, at all times relating to the Complaint, living in Sandpoint, Idaho. At all times which relate to this Complaint, she was the Store Director of Store #322 and the direct supervisor of the Plaintiff. She is sued in her individual capacity.

5. The Defendant, Gordon Hubbard, is an individual, adult, male citizen of the State of Idaho. At all times

which relate to this Complaint, he was the Regional Director for the Idaho State Liquor Dispensary and the direct supervisor of the Defendant Marian Johnson. On information and belief, the Plaintiff states Gordon Hubbard was consulted about, participated in, acted on, directed and/or ratified, in concert with the other named Defendants, the action of terminating the employment of the Plaintiff. He is sued in his individual capacity.

6. The Defendant, Margo Edmiston, is an individual, adult, female citizen of the State of Idaho, at all times relating to the Complaint, living in Boise, Idaho. At all times which relate to this Complaint, she was the Personnel Director for the Idaho State Liquor Dispensary. On information and belief, the Plaintiff states Margo Edmiston was consulted about, participated in, acted on, directed and/or ratified, in concert with the other named Defendants, the action of terminating the employment of the Plaintiff. She is sued in her individual capacity.

7. The Defendant, H. Dean Summers, is an individual, adult, male citizen of the State of Idaho, at all times relating to the Complaint, living in Boise, Idaho. At all times which relate to this Complaint, he was the Superintendent of the Idaho State Liquor Dispensary, appointed pursuant to I. C. §23-201, and charged with administering the general supervision and control of the Dispensary, including, specifically, the hiring and termination of employees like the Plaintiff in accordance with Title 67, Chapter 53, Idaho Code. On information and belief, the Plaintiff states H. Dean Summers was consulted about, participated in, acted on, directed and/or ratified, in concert with the other named Defendants, the action of

terminating the employment of the Plaintiff. He is sued in his individual capacity.

8. The Defendants, John and Jane Does 1-10, are believed to be adult citizens of the United States; their place of residence is presently unknown. On information and belief, the Plaintiff states the John and Jane Doe Defendants 1-10 consulted, participated, acted, directed, encouraged and/or ratified, in concert with the other named Defendants, the action of the Superintendent in terminating the employment of the Plaintiff. At all times which relate to the allegations in this Complaint, they are believed to have been duly appointed officers/employees/staff members of the Idaho State Liquor Dispensary for the State of Idaho. They are sued in their individual capacities.

9. The Defendant, the Idaho State Liquor Dispensary (Dispensary), is an entity of the State of Idaho, created and operating pursuant to Title 23, Chapter 2, Idaho Code. It was the employer of the Plaintiff. It is sued for injunctive relief.

FACTS

10. The Plaintiff, Kristine L. Fankell, was an employee of the Defendant from June 10, 1980, until April 22, 1993. From June 10, 1980 until August, 1992 she worked as a temporary employee of the Defendant located as necessary at the various stores of the Defendant in and around Sandpoint on a regular basis.

11. During the month of December, 1991, the Plaintiff applied for a permanent position with the Defendant

under the terms and conditions established in Title 67, Chapter 53, Idaho Code.

12. During January, 1992, she was tested or evaluated by the Idaho Personnel Commission. As a result of the test, she was placed on a register of potential employees eligible for hire, on or about February 6, 1992.

13. On August 2, 1992, she received an appointment to a probationary position as a liquor store clerk. An employee of the Dispensary, the Defendant Marian Johnson, was her hiring supervisor and at all times responsible for the training, evaluation and supervision of the Plaintiff.

14. From August 2, 1992, until her termination, the Plaintiff performed all duties assigned. This period included acting as Store Manager at Store #322 from January 11, until March 10, 1993 because Defendant Marian Johnson was on a leave of absence.

15. On information and belief, as a matter of practice in the local area, the assignment of the responsibility to act as Store Manager, during a period of absence of the regular Manager, is based on successful performance on the Idaho Personnel Commission test/evaluation. A personal favorite/friend of Defendant Johnson, one Stern, had not achieved a score allowing her to act as Store Manager and could not receive the designation for the period of the Johnson leave of absence.

16. Defendant Johnson intended to designate Stern as Store manager during her leave of absence, nonetheless. The Plaintiff objected to the selection process relating to Stern and requested the Dispensary headquarters

office make the decision regarding who would perform the duties during the Johnson absence. The Dispensary did and Plaintiff Fankell managed Store #322 during the Johnson leave of absence.

17. Upon returning from the leave of absence, Johnson evaluated the Plaintiff's work as of March 13, 1993, as "below expectation."

18. On or about April 2, 1993, the Plaintiff filed a grievance relating to the performance evaluation she had received. In violation of applicable policy and rule, no response to the grievance was made to the Plaintiff.

19. On or about April 7, 1993, State Liquor Superintendent H. Dean Summers notified the Plaintiff, based on the Johnson performance evaluation, that she had failed to successfully complete her initial probationary period. She was given the opportunity to resign or be terminated without cause. The Plaintiff declined to resign and her employment was terminated on April 22, 1993.

20. The Plaintiff received no performance evaluation relating to her termination as required by applicable rule.

CAUSES OF ACTION

Violation of Civil Rights: Substantive Due Process

21. At all times relevant, the individual Defendants were acting under color of law, that is, under color of the Constitution, statutes, laws, rules, regulations customs and practices of the State of Idaho.

22. At all times relevant, the individual Defendants and each of them, separately and in concert, engaged in acts and omissions which resulted in the firing of the Plaintiff from the employ of the Dispensary. This constituted a deprivation of the Constitutional rights, privileges and immunities of the Plaintiff: she was deprived of the property interest she had in her employment with the Dispensary and the benefits which accompanied that employment. While the termination was carried out under color of law, it had no justification or excuse. The termination was illegal, improper and unfounded and, therefore, unrelated to any activity in which they may appropriately and legally engage in the course of administering and directing the personnel affairs of the Dispensary.

23. The Plaintiff, having achieved permanent status by operation of law dictated by the passage of time, was terminated without cause assigned or adequate notice as Constitutionally required.

24. Each of the individual Defendants assisted, acted and actively engaged in the course of conduct leading to the Plaintiff's termination, upheld the action in reviewing it and continued to endorse it long after it had been accomplished. By so acting, each of the individual Defendants became a party to the injuries inflicted on the Plaintiff.

25. The Plaintiff's liberty interest in continuing employment with the State of Idaho free from the arbitrary, capricious and unreasonable impositions and restraints imposed by the individual Defendants is well settled in state and federal law.

26. The Plaintiff's property right to her employment was well settled in state law on April 22, 1993. The individual Defendants forfeited any qualified good faith immunity they might have enjoyed by engaging in a course of conduct directed at the Plaintiff which they knew or reasonably should have known was in violation of the Idaho Personnel Commission Act, Title 67, Chapter 53, Idaho Code: termination of a permanent, classified employee of the State of Idaho who possessed a property right in her employment which was taken away without proper cause or adequate notice.

Violation of Civil Rights: Procedural Due Process

27. At all times relevant, the individual Defendants were acting under color of law, that is, under color of the Constitution, statutes, laws, rules, regulations customs and practices of the State of Idaho.

28. At all times relevant, the individual Defendants and each of them, separately and in concert, engaged in acts and omissions which resulted in the denial of the Plaintiff's right to contest her unfair evaluation. This constituted a deprivation of the Constitutional rights, privileges and immunities of the Plaintiff: she was deprived of a procedure granted to her by law and the benefits which accompanied the protection thereby afforded: the opportunity to defend the evaluation critical of her performance. While the refusal to entertain the grievance was carried out under color of law, it has no justification or excuse. The refusal to entertain the grievance was illegal, improper and unfounded and, therefore, unrelated to any activity in which they may appropriately

and legally engage in the course of administering and directing the personnel affairs of the Dispensary.

29. Each of the individual Defendants assisted, acted and actively engaged in the course of conduct leading to the Plaintiff's termination, including the refusal to entertain the grievance. By so acting, each of the individual Defendants became a party to the injuries inflicted on the Plaintiff.

30. The Plaintiff's procedural due process interest in pursuing her grievance within the Dispensary free from the arbitrary, capricious and unreasonable denials, impositions and restraints imposed by the individual Defendants is well settled in state and federal law.

31. The Plaintiff's procedural due process interest in pursuing her grievance within the Dispensary was well settled in state law on April 4, 1993. The individual Defendants forfeited any qualified good faith immunity they might have enjoyed by engaging in a course of conduct directed at the Plaintiff which they knew or reasonably should have known was in violation of the Idaho Personnel Commission Act, Title 67, Chapter 53, Idaho Code: refusal to receive and address a grievance of a permanent, classified employee of the State of Idaho whose right to do so is protected by law.

DAMAGES

32. As a direct and proximate result of the acts and actions of the Defendants, the Plaintiff was deprived of her property right to her job for a considerable period of time, she lost the use of her earnings and interest on

those earnings, State paid benefits and other consideration for employment, additional expenses incurred as a result of the firing, lost opportunities for overtime work, and was subjected to fear, humiliation, embarrassment and degradation, mental and emotional anguish and distress, loss of reputation and self esteem.

33. The acts, actions and conduct of the individual Defendants in terminating the Plaintiff reflect conduct which was motivated by an evil motive or intent, or involves a reckless or callous indifference to the federally protected rights found in the individual Defendant's obligations arising out of Title 67, Chapter 53, and Title 39, Idaho Code. Punitive damages are necessary to punish and deter these individual Defendants and others similarly situated.

REQUEST FOR INJUNCTIVE RELIEF

34. The termination of the Plaintiff and the denial of her access to the grievance procedure established in law is contrary to the spirit and intent of the applicable statute, Title 67, Chapter 53, Idaho Code.

35. The Plaintiff requests the Court enter an Order forbidding the Dispensary from declining or refusing grievances from classified employees.

36. The Plaintiff requests the Court enter an Order forbidding the Dispensary from terminating permanent, classified employees without cause as required by statute.

37. The Plaintiff, having gained permanent status by operation of law, requests the Court enter an Order

reinstating her to her former position or one of like status and pay.

FEES AND COSTS

38. The Plaintiff has had to hire the undersigned attorneys. She has and will incur costs and expenses related to the prosecution of her claim and the protection of her rights and interests. Plaintiff is entitled to an award of the costs and attorney's fees reasonably and necessarily incurred, under 42 U.S.C. § 1988, I.R.C.P. 54, Idaho Code §12-117 and any other applicable law.

JURY TRIAL DEMAND

In accordance with I.R.C.P. 38 (b) a trial by jury on all issues so triable is demanded.

WHEREFORE, the Plaintiff prays:

1. The Court take jurisdiction over this action;

2. The Court allow the Plaintiff to amend this Complaint in light of information developed during discovery;

3. The Court find the Defendant liable for the causes of action alleged;

4. The Court order the Plaintiff reinstated to her former position or one of like status and pay;

5. The Court award the Plaintiff all such remedies as are afforded at law;

6. The Court award the Plaintiff her attorneys fees and costs incurred;

7. For such other and further relief as the Court may deem just and equitable in the premises.

DATED this 19th day of April, 1995.

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(Verification And Jurat Omitted In Printing)

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KRISTINE L. FANKELL, Plaintiff, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY, Defendants.	)	Case No. CV-95-00529 **DEFENDANTS' MOTION TO DISMISS PURSUANT TO I.R.C.P. 12(b)(6) AND MOTION FOR AWARD OF ATTORNEYS' FEES** (Filed July 5, 1995)

Defendants Marian Johnson, Gordon Hubbard, Margo Edmiston, H. Dean Summers, and the Idaho State Liquor Dispensary (hereinafter the "State Defendants"),

by and through Nicole S. McKay, Deputy Attorney General, hereby move this Court to dismiss Plaintiff's Complaint pursuant to I.R.C.P. 12(b)(6) and move for an award of attorneys' fees pursuant to 42 U.S.C. § 1988. This motion is based upon the memorandum and upon the Affidavit of Margo Edmiston filed herewith.

DATED this 30th day of June, 1995.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Nicole S. McKay
Nicole S. McKay
Deputy Attorney General

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KRISTINE L. FANKELL, Plaintiff, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY, Defendants.	Case No. CV-95-00529 **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO I.R.C.P. 12(b)(6) AND MOTION FOR AWARD OF ATTORNEYS' FEES** (Filed July 5, 1995)

Defendants Marian Johnson, Gordon Hubbard, Margo Edmiston, H. Dean Summers, and the Idaho State Liquor Dispensary (hereinafter the "State Defendants"),

by and through Nicole S. McKay, Deputy Attorney General, hereby file this memorandum in support of Defendants' Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6); Motion for Summary Judgment; and Motion for Award of Attorneys' Fees.

FACTS

Plaintiff Kristine L. Fankell received an appointment to a probationary position as a liquor store clerk with the Liquor Dispensary on August 2, 1992. Complaint, p. 5, ¶ 13. Plaintiff's job performance was evaluated as of March 13, 1993, as "below expectation." Complaint, p. 6, ¶ 17. As of March 13, 1993, Plaintiff had 950.90 hours of credited State service. *See* Attachment 1, Affidavit of Margo Edmiston. Plaintiff filed a grievance from the performance evaluation on April 2, 1993. Complaint, p. 6, ¶ 8. On April 7, 1993, Plaintiff was notified that because she had failed to satisfactorily complete her probationary period, she was being given the opportunity to resign without prejudice and, if she declined to resign, her employment with the Dispensary would be terminated effective April 22, 1993. Complaint, p. 6, ¶ 19. She did not resign, and her employment was terminated. Complaint, p. 6, ¶ 9.

The Complaint alleges two causes of action under 42 U.S.C. § 1983: (1) that the State Defendants deprived Plaintiff of the property interest she had in her employment with the Dispensary by terminating her without proper cause or adequate notice, and (2) that the State

Defendants deprived Plaintiff of due process by depriving her the opportunity to defend the performance evaluation critical of her job performance. Complaint, pp. 6-9, ¶¶ 21-31.

SUMMARY OF LEGAL ARGUMENT

1. The State Defendants move pursuant to Rule 12(b)(6) to dismiss all claims for damages under 42 U.S.C. § 1983 for failure to state a claim upon which relief may be granted because administrative procedures were available to Plaintiff that, had she utilized them, would have provided her due process of law with regard to contesting the termination of her employment.

2. The State Defendants who are officials sued in their personal capacities move pursuant to Rule 12(b)(6) to dismiss all claims for damages under 42 U.S.C. § 1983 for failure to state a claim upon which relief may be granted because the state officers are entitled to qualified immunity under 42 U.S.C. § 1983.

3. Defendant Idaho State Liquor Dispensary moves pursuant to Rule 12(b)(6) to dismiss all claims for injunctive relief under 42 U.S.C. § 1983 for failure to state a claim upon which relief may be granted because the state agency is not a "person" subject to suit under 42 U.S.C. § 1983.

4. The State Defendants should be awarded attorneys' fees under 42 U.S.C. § 1988.

I.

ALL CLAIMS AGAINST THE STATE DEFENDANTS FOR DAMAGES UNDER 42 U.S.C. § 1983 SHOULD BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THE PLAINTIFF HAD AVAILABLE (BUT DID NOT TAKE ADVANTAGE OF) ADMINISTRATIVE PROCEDURES THAT WOULD HAVE PROVIDED HER DUE PROCESS OF LAW HAD SHE CHOSEN TO CONTEST TERMINATION OF HER EMPLOYMENT

A plaintiff in a section 1983 suit usually is not required to exhaust either state judicial or administrative remedies to bring suit alleging a denial of constitutional rights (*e.g.*, freedom of religion, right to interstate travel, etc.). However, when a plaintiff sues under the Fourteenth Amendment alleging that she has been "deprive[d] . . . of life, liberty or property, without due process of law," the alleged constitutional violation consists of two steps: (1) a deprivation of liberty or property (2) without due process of law. *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S. Ct. 1908, 1913-14, 68 L. Ed. 2d 420 (1981). Accordingly, the analysis of the claimed deprivation of liberty or property without due process of law must examine whether there were administrative proceedings available to Plaintiff when her job was terminated.

The Ninth Circuit Court of Appeals has held that where an adequate "administrative remedy . . . was not designed to be remedial, . . . [but] [i]nstead, . . . provide[s] a means of forestalling a threatened future deprivation of civil rights," Plaintiff must run the procedural gauntlet. *Bingnall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976), citing *Ellis v. Dyson*, 421 U.S. 426,

432-33 (1975), and *Whitner v. Davis*, 410 F.2d 24, 28 (9th Cir. 1969).

In *Bingnall*, an Idaho college instructor and husband brought an action under 42 U.S.C. § 1983 claiming that North Idaho College had denied Mrs. Bingnall procedural and substantive due process when it declined to renew Mrs. Bingnall's teaching contract. The college afforded the Bingnalls a hearing, but the Bingnalls chose prematurely to withdraw from it and return to district court. The Ninth Circuit found that the Bingnalls were provided with adequate due process protection and, therefore, affirmed the district court's finding that Mrs. Bingnall had waived her right to further administrative due process by improperly terminating the hearing.

The Ninth Circuit reaffirmed *Bingnall* in *Correa v. Nampa School District No. 131*, 645 F.2d 814 (9th Cir. 1981). Ms. Correa brought an action under 42 U.S.C. § 1983 alleging that the school district deprived her of her constitutional rights when it did not renew her contract. The district court held that Ms. Correa had waived her right to claim a due process violation because she knowingly and voluntarily chose to forego the district's administrative procedures and, instead, pursued a claim through the Office of Civil Rights. The Ninth Circuit affirmed the district court's ruling, relying on the finding in *Bingnall* and finding that "where adequate administrative procedures exist, a person cannot state a claim for denial of procedural rights when he has elected to forego a complete hearing." 645 F.2d at 817, citing *Bingnall*, 538 F.2d at 247.

Similarly to *Bingnall* and *Correa*, in this case, Plaintiff had available to her adequate administrative remedies that she failed to utilize. The administrative remedies that were available to Plaintiff during her employment with the Liquor Dispensary are found in the Idaho Personnel System Act (PSA), which subjects all classified employees of the state to its prescribed system of personnel administration, including its grievance procedure. Idaho Code § 67-5303. Idaho Code § 65-5315 provides that any classified employee may grieve *any matter*, except for compensation and for termination during the entrance probationary period.

The PSA requires the Personnel Commission to adopt a uniform grievance procedure which must contain "time periods for each step of the procedure." Idaho Code § 67-5315(4)(a). The Personnel Commission has adopted a grievance procedure requiring classified employees to file written grievances "not later than five (5) working days after being notified of a grievable action or becoming aware of a grievable matter. . . . " IDAPA 28.20.A.2 (subsequently redesignated at IDAPA 28.01.01.200.02). These processes of law were all that were due Plaintiff and, when she did not take advantage of them, she cannot claim she lost her liberty or property interest in continued employment without due process of law.

A. Deprivation of Procedural Due Process Claim

Plaintiff claims that she was denied due process of law to contest the evaluation critical of her job performance because Defendants did not respond to her grievance and that this deprivation constitutes a violation of

her procedural due process rights. Complaint, p. 8, ¶ 28. In support of this claim, Plaintiff alleges that her job performance was evaluated on March 13, 1993. *Id.*, p. 6, ¶ 17. Plaintiff further alleges that she filed a grievance relating to the performance evaluation she had received on April 2, 1993, *id.*, p. 6, ¶ 18, and that Defendants refused to entertain the grievance. *Id.*, p. 8, ¶ 23.

At no time was Plaintiff denied an opportunity or process by which to defend the evaluation critical of her performance; in fact, she admits she utilized that process on April 2, 1993. *Id.*, p. 6, ¶ 18. However, Plaintiff failed to file the grievance within five working days of receiving notice that her employment had been terminated as is required by IDAPA 28.01.01.200.02. Plaintiff is attempting to turn her failure to *timely* file a grievance of the evaluation and Defendants' "refusal to entertain the grievance," *id.*, p. 8, ¶ 28, into a claim that Defendants deprived her of an opportunity or procedure to defend the evaluation. However characterized, though, Plaintiff's failure to utilize the available administrative procedures by filing a grievance within five (5) days of receiving the performance evaluation constitutes a waiver of her rights under the uniform grievance procedure, regardless of whether Defendants responded to her grievance, and her claims that Defendants violated her civil rights by depriving her procedural due process rights should be dismissed.

B. Deprivation of Substantive Due Process Claim

In support of Plaintiff's claim of deprivation of substantive due process, Plaintiff alleges that on April 7, 1993, she received written notice that in consideration of

her performance evaluation, she was being given the opportunity to resign or be terminated effective April 22, 1993. Complaint, p. 6, ¶ 19. Electing not to resign and thus having been terminated, Plaintiff further alleges that, having achieved permanent status by operation of law, she was terminated without cause assigned or adequate notice. *Id.*, p. 7, ¶ 23.

Assuming Plaintiff had achieved permanent status as is alleged in the Complaint, she was entitled to the full range of procedural rights as set forth by the PSA. Idaho Code § 67-5303. However, Plaintiff did not file a grievance relating to her termination. *See* Attachment 1, Affidavit of Margo Edmiston. Again, Plaintiff's failure to utilize the available administrative procedures by filing a grievance relating to her termination constitutes a wavier of her rights under the uniform grievance procedure and her claims that Defendants violated her civil rights by depriving her substantial due process rights should be dismissed.

II.

ALL CLAIMS FOR DAMAGES AGAINST THE STATE INDIVIDUAL DEFENDANTS UNDER 42 U.S.C. § 1983 SHOULD BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THE STATE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Although state officers or employees may be sued in their individual or personal capacities, state officers sued in their personal capacities are frequently entitled to the defense of qualified immunity. *See Harlow v. Fitzgerald,*

457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).[1] In *Harlow v. Fitzgerald,* the U.S. Supreme Court explicitly eliminated the element of subjective good faith in establishing the current standard for qualified immunity and set forth a standard that is to be decided by the court, holding:

> [G]overnment officials performing discretionary function[s] are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818.

The Court pointed out that the purpose of this objective standard was to resolve insubstantial claims prior to discovery. 457 U.S. at 813-18. The Court stated that the important public purpose of the qualified immunity doctrine is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by

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[1] *Harlow* was a suit against federal, not state, officials. But, the U.S. Supreme Court has recognized that the same qualified immunity rules apply in suits against state officers under 42 U.S.C. § 1983 and in suits against federal officers under *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971). *Davis v. Scherer,* 468 U.S. 183, 194, n.12 (1984). Accordingly, this brief will cite the law of qualified immunity that can be claimed by federal officials sued under the federal Constitution interchangeably with the law of immunity of state or local officials sued under 42 U.S.C. § 1983.

action taken 'with independence and without fear of consequences.' " 457 U.S. at 819 (quoting *Pierson v. Ray,* 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L. Ed. 2d 288 (1967)).

In *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), the Court emphasized that the qualified immunity defense provides "*immunity from suit* rather than a mere defense to liability." 472 U.S. at 526. Thus, it is an issue that should be decided by the court before discovery and an issue that will justify an interlocutory appeal if the motion for summary judgment is not granted. As *Mitchell* explained:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the action the defendant claims he took.

472 U.S. at 528.

The Supreme Court later broadened the scope of the qualified immunity defense somewhat in *Anderson v. Creighton,* 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The Court set forth the standard to be applied in determining whether the constitutional right was sufficiently clear, holding that "[t]he contours of the right

must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* The Court also explained that, "in light of preexisting law the unlawfulness must be apparent" for the public official to be liable. *Id.* These cases were summarized by the Idaho Supreme Court in *Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993).

Elder v. Holloway, ___ U.S. ___, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994), is a recent U.S. Supreme Court case holding that the issue of whether the law is "clearly established" is a question of law to be determined by the Court. As such, the courts are not limited to the authorities presented by the parties in making this determination. The Ninth Circuit Court of Appeals had held that it was the plaintiff's burden to identify the universe of law from which the court could determine whether the right allegedly violated was clearly established. The Court rejected this holding, since it is the court's duty to determine whether the law was clearly established.

The case is the latest expression of the legal principles to be applied. Some of the pertinent holdings in *Holloway* are the following:

> The doctrine of qualified immunity shields public officials like the respondents from damages actions unless their conduct was unreasonable in light of clearly established law. . . . *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

. . . .

> The central purpose of affording public officials qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability. *Harlow v. Fitzgerald, supra*, at 806.

114 S. Ct. at 1019, 1023 (partial citations omitted).

In *Arnzen v. State*, the Idaho Supreme Court, after reviewing *Harlow v. Fitzgerald; Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991); and *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986), provided that in order to determine whether a state official, in his individual capacity, is entitled to qualified immunity, three questions must be asked:

1. Was there a clearly established law;
2. Did [defendant's] conduct violate a clearly established right of [plaintiff's]; and
3. Was [defendant's] conduct reasonable?

123 Idaho at 904, 854 P.2d at 247.

The Complaint in this matter alleges two causes of action: (1) a violation of Plaintiff's substantive due process rights, and (2) a violation of Plaintiff's procedural due process rights. Complaint, pp. 6-9, ¶¶ 21-31. Each cause of action will be addressed separately.

A. Violation of Civil Rights: Substantive Due Process Claim

Plaintiff has alleged that, as a permanent employee, Defendants' termination of her employment without cause assigned or adequate notice violated her substantive due process rights. Complaint, p. 7, ¶ 23. However, Plaintiff's claim against Defendants should be dismissed because Defendants' conduct in terminating Plaintiff was reasonable under the clearly established law that Plaintiff was not yet a permanent employee and, as such, did not violate any right of Plaintiff.

1. Was There a Clearly Established Law?

At the time Plaintiff was terminated, the entrance probation period beyond which one become a permanent employee had been set by the Personnel Commission at "one thousand forty (1040) hours of credited state service." IDAPA 28.15.A.2.a. (Note that IDAPA 28.15.A.2.a subsequently has been redesignated at IDAPA 28.01.01.150.02.a.) In addition, the Personnel Commission had also set by rule that "should a probationary employee fail to service satisfactorily, the appointing authority shall no later than thirty (30) calendar days after the expiration of the probationary period provide the employee and the Personnel Commission a performance evaluation indicating unsatisfactory performance." IDAPA 28.15.C.1. (Note that IDAPA 28.15.C.1 subsequently has been redesignated at IDAPA 28.01.01.152.) Finally, the Personnel Commission had set by rule that an employee who fails to serve satisfactorily during the entrance probation shall first be given the

opportunity in writing to resign without prejudice, and an employee who fails to resign may be terminated without cause assigned and without the right to file a grievance or an appeal. IDAPA 28.15.C.2 (subsequently redesignated at IDAPA 28.01.01.152.02).

2. Did the Defendants' Conduct Violate a Clearly Established Right of Plaintiff's?

This prong of the qualified immunity analysis is a compound question: (1) did Plaintiff have a clearly established right; and (2) did Defendants violate it?

As a probationary employee under IDAPA 28.15.A.2.a and upon a finding that Plaintiff had failed to satisfactorily complete her probationary period, Plaintiff had the right to receive a performance evaluation indicating unsatisfactory performance and the, right to resign without prejudice or the employing agency could terminate her employment without cause assigned and without the right to file a grievance or an appeal. On March 13, 1993, Plaintiff received a performance evaluation indicating unsatisfactory performance and, on April 7, 1993, Defendants notified Plaintiff in writing that, because she had failed to satisfactorily complete her probation, she was being given the opportunity to resign without prejudice and, if she declined the opportunity to resign, her termination would become effective 15 calendar days from the date of the letter (April 22, 1993). Complaint, p. 6, ¶¶ 17, 19. Defendants provided Plaintiff each and every one of the rights she was entitled to as a probationary employee.

3. Was Defendants' Conduct Reasonable?

Relying upon Personnel Commission Rule 28.15.A.2.a setting the entrance period of probation at 1040 hours of credited state service and Rules 28.15.C.1 and 28.15.C.2 setting the procedure to be followed when terminating a probationary employee, Defendants' conduct in terminating Plaintiff's employment for failure to satisfactorily complete her probationary period based upon her performance evaluation and supporting documentation was that of a reasonably competent public official in 1993. On March 13, 1993, when Plaintiff was evaluated, she had 887.90 hours of credited state service, well within the 1040 hours that make up the entrance period of probation under the Personnel Commission rule. *See* Attachment 1, Affidavit of Margo Edmiston. In addition, when Plaintiff was notified that her evaluation rated her performance unsatisfactory and that her employment was to be terminated, she was given the opportunity to resign. Defendants' conduct in reliance of Personnel Commission rules at IDAPA 28.15.A.2.a, 28.15.C.1 and 28.15.C.2 in the termination of Plaintiff was reasonable.

Although the Personnel Commission rule was found in February of 1994 to have erroneously construed Idaho Code § 67-5309(I) (subsequently redesignated at Idaho Code § 67-5309(j)) in providing for a probationary period of 1040 hours in IDAPA 28.15.A.2.a, *Hood v. Idaho Det. of Health and Welfare*, 125 Idaho 151, 868 P.2d 479 (1994), Defendants reasonably believed, even though it was later determined to be erroneous under *Hood*, that the termination of Plaintiff's employment on April 7, 1993, for failure to satisfactorily complete her probationary period to be lawful in light of IDAPA 28.15.A.2.a. *See Hunter v. Bryant*,

502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (court deciding public officer's claim of qualified immunity should ask whether officers acted reasonably under settled law in circumstances, not whether another reasonable, or more reasonable, interpretation of events could be construed five years after the fact.)

B. Violation of Civil Rights: Procedural Due Process Claim

Plaintiff alleges in support of her procedural due process claim that Defendants' "refusal to entertain her greivance" deprived her of a procedure to defend her evaluation and, therefore, violated her procedural due process rights. Complaint, p. 8, ¶ 28. However, Plaintiff's claim against Defendants should be dismissed because Defendants' conduct in response to the grievance filed by Plaintiff was reasonable under clearly established law and thus did not violate the rights of Plaintiff.

1. Was There a Clearly Established Law?

At the time of Plaintiff's employment with the Dispensary on August 2, 1992, through April 22, 1993, Idaho Code § 67-5315 provided in part:

> (1) . . . A classified employee may grieve any matter, except that compensation shall not be deemed a proper subject for consideration under the grievance procedure except as it applies to alleged inequities with a particular agency or department, and except for termination during the entrance probationary period.
>
> . . . .

> (4) On or before July 1, 1987, the Idaho Personnel Commission shall adopt a rule defining a uniform grievance procedure for use . . . [by] all participating departments. . . .

Pursuant to Idaho Code 67-5315(4), the Idaho Personnel Commission defined at IDAPA 28.20.A.2 (now IDAPA 28.01.01.200.02) that "[a]ny classified employee with permanent, provision or entrance probation status may file a grievance as defined by section 67-5215(1), Idaho Code. An employee shall file a grievance in writing not later than five (5) working days after being notified of a grievable action or becoming aware of a grievable action. . . ."

2. Did Defendants' Conduct Violate a Clearly Established Right of Plaintiff's?

This prong of the qualified immunity analysis is a compound question: (1) did Plaintiff have a clearly established right; and (2) did Defendants violate it?

Pursuant to Idaho Code § 67-5315 and IDAPA 28.20.A.2, Plaintiff clearly had the right to file a grievance relating to the performance evaluation within five (5) working days of obtaining knowledge of the evaluation. Plaintiff was evaluated and signed the evaluation on March 13, 1993. *See* Attachment 1, Affidavit of Margo Edmiston; Complaint, p. 6, ¶ 17. Plaintiff had the right to file a grievance objecting to the contents of that evaluation up to and including March 19, 1993. However, Plaintiff failed to file a grievance within that time period; Plaintiff's grievance was not filed until April 2, 1993. Complaint, p. 6, ¶ 18.

Although Plaintiff alleges that she filed a grievance relating to the performance evaluation, *Id.*, p. 6, ¶ 18, Plaintiff alleges that Defendants deprived Plaintiff the opportunity to defend the evaluation critical of her performance because Defendants did not respond to the grievance. *Id.*, p. 8, ¶ 28. However, by Plaintiff's own admission, Plaintiff was not deprived of the process due her to defend her evaluation; she had a right to exercise, but she did not *timely* exercise her right. Plaintiff's failure to timely file a grievance does not constitute a violation of Plaintiff's procedural due process rights by Defendants.

3. Was Defendants' Conduct Reasonable?

Because Plaintiff's grievance of her job performance evaluation was not timely filed, Defendant was under no obligation to respond to it. Defendant's actions were not only reasonable, but they were entirely lawful under the laws and rules of the Personnel Commission.

III.

ALL CLAIMS AGAINST DEFENDANT STATE LIQUOR DISPENSARY UNDER 42 U.S.C. § 1983 SHOULD BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THE STATE AGENCY IS NOT A "PERSON" SUBJECT TO SUIT WITHIN THE MEANING OF 42 U.S.C. § 1983

Plaintiff has alleged Defendants deprived her of procedural and substantive due process in violation of 42 U.S.C. § 1983. This statute, a section of the Civil Rights Act of 1871, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Plaintiff alleges that "the Defendant, the Idaho State Liquor Dispensary (Dispensary), is an entity of the State of Idaho, created and operating pursuant to Title 23, Chapter 2, Idaho Code" and "is sued for injunctive relief." Complaint, p. 4, ¶ 9.

The United States Supreme Court has ruled that states and state agencies are not "persons" within the meaning of 42 U.S.C. § 1983, *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), regardless of the relief sought, be it injunctive or legal (damages). The Idaho Supreme Court, in *Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993), concluded: "Thus, it is clear that, in Idaho, the State, for purposes of 42 U.S.C. § 1983, is not a 'person'." 123 Idaho at 903-04, 854 P.2d at 246-47. Both state and federal precedent is clear that the State Liquor Dispensary, as a state agency, must be dismissed from Plaintiff's suit.

IV.

THE STATE DEFENDANTS SHOULD BE AWARDED ATTORNEYS' FEES UNDER 42 U.S.C. § 1988

42 U.S.C. § 1988 is the attorneys' fees statute associated with suits brought under 42 U.S.C. § 1983. In relevant part it provides: "In any action or proceeding to enforce [42 U.S.C. § 1983] the court, in its discretion, may allow the prevailing party . . . a reasonable attorneys' fee as part of the costs." Although the language of this statute is neutral between prevailing plaintiffs and prevailing defendants, the statute has been interpreted to allow awards to prevailing defendants only when the plaintiff's underlying claim is "frivolous, unreasonable or groundless." *Roadway Express, Inc. v. Piper*, 447 U.S. 753, 762, 100 S. Ct. 2455, 2461, 65 L. Ed. 2d 488 (1980). The Ninth Circuit has upheld the award of attorneys' fees to prevailing defendants, *Maag v. Wessler*, 944 F.2d 654 (9th Cir. 1991); *Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988), so has our neighboring state of Washington, *Meyer v. University of Washington*, 719 P.2d 98 (Wash. 1986). Attorneys' fees should be awarded to the State Defendants because they should prevail as a matter of law on the basis of absolute or qualified immunity, and a complaint that cannot overcome a Rule 12(b)(6) motion is unreasonable and groundless.

DATED this 30th day of June, 1995.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Nicole S. McKay
Nicole S. McKay
Deputy Attorney General

(Certificate Of Service And
Attached Affidavit Omitted In Printing)

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

Kristine L. Fankell, **Plaintiff,** **vs.** **Marian Johnson, Gordon Hubbard, Margo Edmiston, H. Dean Summers, each of them individually, and the Idaho State Liquor Dispensary,** **Defendants.**	**Case No. CV-95-00529** **Plaintiff's Response to Defendants' Motion to Dismiss** (Filed Dec. 1, 1995)

The Plaintiff sued the Defendants for the termination of her employment with the State of Idaho stating they had deprived her of her substantive and procedural due process rights. The defendants reply they cannot be sued

under their analysis of the facts and move to dismiss under IRCP 12(b)(6).

Standard of Review

A 12(b)(6) motion is, effectively, a motion for summary judgment, with its attendant, well known standards. *ID Schs. for Equal Educ. Opportunity v. Evans,* 123 ID 598 (1993), *Miles v. Idaho Power Co.,* 116 ID 635 (1989). Every reasonable intendment to sustaining the complaint must be made. *Harper v. Harper,* 122 ID 535 (App. 1992) The plaintiff is entitled to have all inferences from the record viewed in her favor, and only then may the question be raised as to whether a claim for relief has been stated. *Id., ID Schs., supra; Miles, supra.* However, there appears to be no requirement that the motion's proceedings parallel IRCP 56(c).

Facts before the Court

There are but three slim sources of facts before the Court on this Motion: those contained in the verified Complaint (as amended), the Plaintiff's supplemental Affidavit and the Edmiston Affidavit. These sources reveal the following chronology:

6.10.80	Fankell first employed by ISLD (Comp., ¶9)
8.2.92	Fankell probationary appointment as Liquor Store Stock Clerk (Comp., ¶12; Edmiston Affidavit (hereafter Edmiston) ¶2)
2.2.93	Six month anniversary of initial employment. IRE 201,

I. C. §73-114(4)

1.11.93-3.10.93	Fankell acts a Store Manager for Store #322 (Comp., ¶13)
3.25.95	Defendant Johnson signs Plaintiff "below expectation" performance evaluation for period ending March 13, 1993. (Comp., ¶16; Edmiston, ¶3)
3.30.95	Plaintiff receives performance evaluation. (Fankell Affidavit, hereafter Fankell, ¶___.
4.2.93	Plaintiff grieves performance evaluation, receives no response. (Comp., ¶17)
4.7.95	Defendant Summers notifies Plaintiff will be terminated for failure to complete initial probationary period. (Comp., ¶18; Edmiston, ¶6)
4.22.93	Plaintiff terminated. Comp., ¶18; Edmiston,¶7)

ARGUMENT

The premise offered by the State is simple enough: there is no set of facts from which relief may arise: this Plaintiff was deprived of neither procedural nor substantive due process, all named defendants are immune in any event. The Plaintiff was obliged to exhaust her administrative remedies before filing this action. She has no process due her because she did not timely file a grievance regarding her March 13, 1993 (date of end of evaluation period) performance evaluation. Apparently as a result of this failure, she could lose no property right.

As the law on the time frame for the filing grievances was clearly established on the date of her termination, the Defendants are entitled to a qualified immunity.

Omitted from the Defendant's argument is the controlling law and/or the facts necessary to dismiss the claim.

The Plaintiff is not required to exhaust her administrative remedies.

Citing cases decided in 1976 (*Bignall v. North Idaho College*, 538 F2d 243 (9th Cir.) and 1981 (*Correa v. Nampa Sch. Dist No. 131*, 645 F2d 814 (9th Cir.), the Defendant omits the dispositive case: *Patsy v. Bd. of Regents*, 457 US 496 (1982). There the Supreme Court held: "that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." (*Id.* @516) While *Patsy* was a federal court action, the Court in *Felder v. Casey* (487 US 131 (1988)) clearly held that *Patsy's* no exhaustion of state administrative remedies was fully applicable to the claim here: a state court § 1983 action.

The Defendants properly notes the Idaho Personnel Commission (IPC), pursuant to the legislature's dictate (I.C §67-5315(1)), adopted a grievance procedure for all departments (with specific timeframes for action). The Defendants then argue the Plaintiff did not file her grievance in a timely fashion, precluding this Court's review. However, to do so, they invite the Court to guess that a performance evaluation with an ending date of March 13, signed by the reviewing supervisor on March 25 was not timely when it was filed on April 2. Again, properly

noted, the filing requirement runs from "five (5) working days after being notified of a grievable action or becoming aware of a grievable action . . . " IDAPA 28.20.A.2. [The revision of the IDAPA citation scheme and the IPC's revision of the statutes relating to grievances and appeals occurred after the termination of the Plaintiff. Citations herein refer to those applicable at the time of her termination, April 22, 1993.]

As stated in the Affidavit of the Plaintiff, she received the evaluation on or about March 30, 1993 and filed her grievance shortly after being notified, April 2. The omission of the date the State asserts was the day of the notice to the Plaintiff fatally undercuts its assertion the grievance was not timely filed. (Assuming solely for argument the filing was even required.) Summary judgment is precluded on this point alone: the uncontested material facts demonstrate a timely filing.

While failure to grieve does constitute a waiver of the right of IPC review (I. C. §67-5315(3)), there is no basis in fact to the Defendant's claim of waiver. The only response, if it can be so denominated, was the April 7, 1993 notice of failure to perform satisfactorily during the probationary period. The Plaintiff believes she was terminated *not* for unsatisfactory performance but for her objection about who should manage the store to which she was assigned during the Johnson absence. A probationary employee does have the right, and the employer a duty, to a performance evaluation. *Brigham v. Dept. of Health and Welfare*, 106 ID 347 (1984). It would appear beyond cavil that the evaluation relied upon for the assertion of purportedly poor performance would be correctly calculated. The failure of the Defendants to even assert

what day the Plaintiff was put on notice of her purportedly poor performance dictates the denial of summary judgment.

As to the claim the Plaintiff cannot assert a claim for the deprivation of substantive due process (her property right in her employ by the State), by virtue of an asserted failure to timely file a grievance (presumably a failure to exhaust administrative remedies argument), the above analysis dictates it, too, must fail.

The movant is required to furnish this Court with uncontested material facts sufficient, in the light of the applicable law, to support a determination the Plaintiff fails to state a claim (or, perhaps more properly, is owed judgment as a matter of law). Failure to clearly demonstrate by affidavit an untimely filing precludes summary judgment on this point.

Most importantly, however, is the fundamental proposition that exhaustion of administrative (and state judicial) remedies is *not* required before filing the action.

The Defendants are not entitled to qualified immunity: termination without cause of an employee made permanent by operation of law deprives her of her property interest in employment.

The Defendants are not immune from this suit. On the day of her termination the Plaintiff had already achieved permanent status by operation of law.

First, it was clearly established on April 22, 1993, that permanent classified state employees enjoyed and possessed a property interest in their employment. *Cf. Harkness v. City of Burley,* 110 ID 353 (1986); *Cleveland Bd. of Education v. Loudermill,* 470 US 532 (1985); I. C. § 67-5309(m) [no termination without cause] with *Tiffany v. City of Payette,* 121 ID 396 (1992) and *Arnzen v. Richardson,* 123 ID 899 (1993).

Second, the Defendant's reliance on an incorrect IPC regulatory interpretation does not make the applicable federal constitutional law unclear.

Third, the decision to terminate based on the purportedly poor performance was manifestly wrong on its face: the addition of the points, resulting in a 'below expectation' rating was incorrect. The Plaintiff had sufficient points to achieve a 'meets expectation' rating.

The failure to entertain the grievance on her performance evaluation, which she had a right to file, that apparently precipitated her termination deprived her of the process which she was due: access to the grievance procedure itself.

The procedural due process claim.

The Plaintiff received her performance evaluation from Defendant Johnson on March 30, 1993 (Fankell, ¶___). She filed a grievance about her 'below expectation' performance evaluation on April 2, 1993. Amndd. Comp. ¶18, Edmiston, ¶5. The Defendant's did not reply. Amndd. Comp. ¶18. The Plaintiff clearly had a right to file and pursue a grievance about her performance under I. C. §67-5315(1) and IDAPA 28.20.A.2. The Defendants,

responsible for processing the grievance through its levels of management, necessarily had a duty to respond. IDAPA 28.20.A.3. [Plaintiff notes at this early stage in the proceedings the actual grievance procedure at issue is not before the Court.]

Under I. C. §67-5315 the Plaintiff clearly had a right to file and pursue a grievance.

In accordance with this statute, the Dispensary, her employer, obviously violated a clearly established right when no action was taken on her grievance.

The failure to address the timely filed grievance demonstrates the Dispensary and its agents, the named Defendants, was patently unreasonable. Indeed, it appears the sole response to the filing of the grievance was the notice she would be terminated for unsatisfactorily performance during the probationary period based on the incorrectly added evaluation points.

The Plaintiff's right of access to the grievance procedure, owed to her as a matter of law, was clearly violated by the Dispensary and its agents because of their inaction. The Plaintiff suffered a deprivation of the procedural due process owed to her. The Dispensary and its agents were required to process the grievance, did not and, thusly, violated her rights.

Summary judgment on this point must be denied: the factual basis for the motion is inadequate to support a ruling in favor of the Defendants.

The substantive due process claim.

As noted earlier, the law regarding a permanent employee's property interest in her employment was well

established on the date of her termination. The Defendants can take no solace in the subsequent *Hood v. Health & Welfare*, 125 ID 151, (1994) as a shield from liability – the Idaho Supreme Court decision that the passage of time, pursuant to law and not under the incorrect IPC interpretation, made Hood a permanent employee is equally applicable to the Plaintiff Fankell.

While the decision in *Hood* followed the termination, the Defendants "cannot use the absence of case law directly on point to shield them from liability. The unlawfulness of their conduct should have been apparent to them in light of preexisting case law." *Ostlund v. Bobb*, 825 F2d 1371 @1374, (1988). In *Ostlund*, the decision on point was not rendered by the state court until three years after the filing of the federal complaint in the case.

As initially noted in *Board of Regents v. Roth*, 408 US 564 (1972), "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." *Id.* @577. The law on transforming probationary employees into permanent ones, in light of the failure of the appointing authority to evaluate the employee within 30 days of the conclusion of the six month probationary period, went into effect on July 1, 1987, the effective date of the adoption of the amendments to I. C. §67-5309(i). (87 ID Sess. L., Ch. 99, p. 194) The law relating to the Plaintiff's permanent status was clearly established approximately four (4) *years* before her hire as a probationary employee.

In *Arnzen, supra,* the Court bifurcated the query respecting the violation of a clearly established right. As noted above, the law in effect before her hire established a finite probationary period and dictated failure to evaluate an employee within 30 days of the end of the period made the employee permanent. The termination of a permanent employee without notice or cause as required by I. C. §67-5309(m) and *Loudermill, supra,* obviously violates her established rights, irrespective of the Commission's erroneous interpretation upon which the Defendants rely for their motion.

As stated in Arnzen, *id.* @906: "We hold that the law was clearly established in 1989 that Arnzen, as a "classified" and "permanent" employee of the State, had a property interest in continued employment. Therefore, Richardson, in terminating Arnzen without due process, did not act as a reasonably competent public official in Idaho in 1989." This termination of a permanent by operation of law employee in 1993 is subject to the same analysis and rule. The Defendants did not act reasonably in light of the established law, irrespective of the Commission's erroneous interpretation.

The request for injunctive relief.

A review of the Amended Complaint reveals a request for injunctive relief to be entered against the State agency for the equitable relief of reinstatement and prospective prohibition of refusing grievances and termination of permanent employees without cause. The Defendant correctly notes both state and federal precedent prohibit suit against the State (or its entities) and it is not defined as a "person" for § 1983 purposes.

As stated by Schwartz and Kirklin, "The Eleventh Amendment decisional law is subtle and complex. It draws important dichotomies between municipal and state liability, between state law claims and federal claims, and between retrospective and prospective relief. Prospective relief is available against a state official sued in an official capacity. [Citing *Will v. Michigan Dept. of State Police,* 491 US 58 (1989)]." *Section 1983 Litigation, Claims, Defenses and Fees,* 2nd Ed., Schwartz & Kirklin, Wiley Law Pub., 1991, @ pps. 439-440. The sole purpose of the claims against the improperly named Dispensary being injunctive, the Plaintiff will consent to the dismissal of the Dispensary from the action if leave to amend is granted to name the Superintendent of the Dispensary in his official capacity.

This action is not frivolous.

Offering no rationale for the award of attorneys fees in its favor except for the bare assertion the case is frivolous, unreasonable or groundless, the Defendants request an award of fees for the response to the Motion. [Note may be made that the file, from the perspective of the Defendant's work, consists solely of the pending Motion, its Notice of Hearing and the Edmiston Affidavit.]

The standard for the award of fees under 42 USC 1988 is an amalgam of the rules of *Hughes v. Rowe* (449 US 5 (1980)) and *Christiansburg Garment Co. v. EEOC* (434 US 412 (1978)). Under the standard, the "fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees." *Hughes, supra,* @14.

The sole support of the award of fees to the Defendants is the last sentence of their brief: "Attorneys' fees should be awarded to the State Defendants because the should prevail as a matter of law on the basis of absolute or qualified immunity, and a complaint that cannot overcome a Rule 12(b)(6) motion is unreasonable and groundless." Defendant's Memo in Support of Motion, p. 15. Plaintiff notes the State's claim of absolute immunity, discussed nowhere in the previous 14 pages, first arises in the last sentence of the brief. The assertion a fee award should be based on an unmentioned, unbriefed and unasserted claim, patently inapplicable to this factual setting, is not well grounded.

The assertion the Complaint cannot withstand the motion is premature. No discovery to flesh out the Complaint has been conducted, no facts sufficient to support the claim of the Plaintiff's failure to timely file her grievance were furnished to the Court to provide it with the factual basis for a ruling in favor of the Defendants on a point omitting the applicable Supreme Court holdings.

The fee request should be denied in all respects.

CONCLUSION

There is simply no requirement the Plaintiff exhaust her state administrative remedies before filing suit. The law determining permanent, classified state employees have a property interest in their employment was established before the Plaintiff even applied for a permanent position. Where the Idaho Supreme Court has found the IPC has interpreted its statutory charter incorrectly after

the termination of the Plaintiff, qualified immunity cannot protect the Defendants from suit – the question is not the Commission's interpretation of the statute, but the existence of a property interest in employment on the date of the termination. Plaintiff seeks leave to amend the Complaint to bring suit against the Superintendent in his official capacity for the purpose of requiring him (and his successors) to comply with applicable law regarding accepting and responding to grievances. The Defendants request for fees should be denied, this case is not frivolous.

DATED this 30th day of November, 1995,

and respectfully submitted
on behalf of the Plaintiff,
Kristine Fankell, by

/s/ W. B. Latta, Jr.
W. B. Latta, Jr.,
one of her counsel.

(Certificate Of Service And
Attached Affidavit Omitted In Printing)

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**IN THE DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT STATE OF IDAHO,
IN AND FOR THE COUNTY OF BONNER**

KRISTINE L. FANKELL, Plaintiff, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY, Defendants.	)	Case No. CV-95-00529 **DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS** (Filed Dec. 21, 1995)

COME NOW Defendants, by and through Nicole S. McKay, Deputy Attorney General, and hereby file this Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss.

FACTS

The facts relied upon in Defendants' Motion for Summary Judgment are uncontested by the Plaintiff. Those facts are as follows:

Plaintiff Kristine L. Fankell received an appointment to a probationary position as a liquor store clerk with the Liquor Dispensary on August 2, 1992. Complaint, p. 5, ¶ 13. Plaintiff's job performance was evaluated as of March 13, 1993, as "below expectation." Complaint, p. 6, ¶ 17. As of March 13, 1993, Plaintiff had 950.90 hours of credited State service. *See* Attachment 1, Affidavit of Margo Edmiston. Plaintiff filed a grievance from the performance evaluation on April 2, 1993. Complaint, p. 6, ¶ 8. On April 7, 1993, Plaintiff was notified that because she had failed to satisfactorily complete her probationary period, she was being given the opportunity to resign without prejudice and, if she declined to resign, her employment with the Dispensary would be terminated effective April 22, 1993. Complaint, p. 6, ¶ 19. She did not resign, and her employment was terminated. Complaint, p. 6, ¶ 9.

I.

ADMINISTRATIVE PROCEDURES WERE AVAILABLE TO PLAINTIFF THAT, HAD SHE UTILIZED THEM, WOULD HAVE PROVIDED HER DUE PROCESS OF LAW WITH REGARD TO CONTESTING THE TERMINATION OF HER EMPLOYMENT

Defendants acknowledged that a plaintiff in a section 1983 case is not required to exhaust either state judicial or administrative remedies to bring suit alleging a denial of

constitutional rights. For example, a plaintiff is not procedurally barred from filing suit under 42 U.S.C. § 1983 for failure to file a state tort claim. However, when a plaintiff sues under the Fourteenth Amendment alleging deprivation of property without due process of law and the plaintiff had available administrative remedies that would have provided her due process of law had she utilized them, Plaintiff's claims should be dismissed on the merits because she has not been deprived of property without due process of law. In other words, when the plaintiff has alleged deprivation of a property interest without due process of law, as the basis for her suit under 42 U.S.C. § 1983, her failure to avail herself of administrative procedures available to her is fatal on the merits when she claims deprivation of property without due process of law.

Plaintiff cites two cases in opposition to Defendants' Motion to Dismiss, neither of which allege a Fourteenth Amendment deprivation of property without due process of law.

The first case Plaintiff cites to is *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 83 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). *Patsy* is a section 1983 action in which the plaintiff alleged that the plaintiff's employer had denied her employment opportunities on the bases [sic] of her race and sex. *Patsy* is a Fourteenth Amendment equal protection claim, not a due process claim, and thus, the Court's holding that the plaintiff in *Patsy* did not have to exhaust administrative remedies prior to bringing a section 1983 claim applies to this case only in so far as that decision holds that failure to avail oneself of state administrative procedures is not a procedural bar to filing suit

under 42 U.S.C. § 1983. *Patsy* does not, however, address whether failure to avail oneself of available administrative procedures can and should result in a loss on the merits in a claim for deprivation of property without due process of law.

The second case Plaintiff cites to is *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). In *Felder* the petitioner brought a state court action against the city and certain officers under 42 U.S.C. § 1983 alleging that the beating he suffered from the officers and his subsequent arrest was unprovoked, racially motivated and violated his rights under the Fourth and Fourteenth Amendments. The Supreme Court overruled the Wisconsin Supreme Court's holding that the Wisconsin notice-of-claim statute applies to federal civil rights actions brought in state court.

Like *Patsy*, the *Felder* case is distinguishable from the instant case in several respects. One, the *Felder* case is not a Fourteenth Amendment due process claim, as is the instant case; and two, the *Felder* case holds that a plaintiff does not have to comply with the state notice-of-claim statute. Defendants are not contending that the Plaintiff in the instant case was required to comply with the Idaho State Tort Claims Act before filing this section 1983 claim. Defendants are contending that the Plaintiff had administrative remedies available to her that would have provided her due process had she utilized them, which the *Felder* case does not address.

The cases cited by Defendant in Defendants' Motion to Dismiss are directly on point and support Defendants' Motion to Dismiss. In *Bignall v. North Idaho College*, 538

F.2d 243 (9th Cir. 1976), citing *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975), the Ninth Circuit Court of Appeals held that where adequate "administrative remedy . . . was not designed to be remedial, . . . [but] [i]nstead, . . . provide a means of forestalling a threatened future deprivation of civil rights," a plaintiff must run the procedural gauntlet. As stated in Defendant's Motion to Dismiss, the court in *Bignall* found that, because the college afforded the Bignalls a hearing, although the Bignalls chose prematurely to withdraw from it, Mrs. Bignall had waived her right to further administrative due process by improperly terminating the hearing.

The second case cited in Defendants' Motion to Dismiss, *Correa v. Nampa School District No. 131*, 645 F.2d 814 (9th Cir. 1981), held that the plaintiff had waived her right to claim a due process violation because she knowingly and voluntarily chose to forego the district's administrative procedures and, instead, pursued a claim through the Office of Civil Rights.

Bingnall [sic] and *Correa* both hold that a plaintiff cannot maintain a section 1983 action for deprivation of due process where adequate administrative procedures existed and the plaintiff chose to forego those procedures that would have afforded the plaintiff due process of law. It follows, under *Bingnall* [sic] and *Correa*, that Plaintiff's case in the instant action should be dismissed because she elected to forego administrative procedures that would have provided her due process had she elected to utilize them.

A. Substantive Due Process Claim

Plaintiff does not specifically respond to Defendants' Motion to Dismiss on her substantive due process claim on the grounds that Plaintiff failed to avail herself to the administrative due process remedies available, other than to state that analysis referred to generally in his brief dictate that the defense must fail. Therefore, Defendants refer this Court the legal argument provided in Defendants' Motion to Dismiss and the analysis above in deciding this issue.

B. Procedural Due Process Claim

In support of Defendants' Motion for Summary Judgment specifically on Plaintiff's procedural due process claim, Defendants argued that Plaintiff failed to file her grievance objecting to her performance evaluation within five (5) working days of receiving notice of the evaluation. Defendants' motion was based upon information available at the time the motion was filed and upon the understanding that the performance evaluation was given to Plaintiff on March 25, 1993, the date the evaluation is signed. *See* Exhibit 1. However, upon receipt of Plaintiff's Affidavit, attached to Plaintiff's Response to Defendants' Motion to Dismiss, which stated that she received the performance evaluation on March 30, 1993, Defendants' counsel was able to confirm that Plaintiff did in fact receive the evaluation on March 30, 1993. As such, Defendants concede that Plaintiff filed her grievance of her performance evaluation within five (5) days of the receipt of the evaluation.

However, even assuming for purposes of argument that Plaintiff was deprived of procedural grievance rights under state law when no response to her grievance was received, she did not suffer a deprivation of property without due process of law because Plaintiff, as a probationary employee, could be terminated without any cause assigned during her probationary period and therefore had no property interest that was lost when there was no grievance hearing. IDAPA 28.01.01.152.02.a. As such, even if the Defendants had responded to Plaintiff's grievance of her evaluation, Defendants still could have terminated Plaintiff without cause assigned, as was done.

II.

THE STATE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY UNDER 42 U.S.C. § 1983

In response to Defendants' Motion to Dismiss on the grounds of qualified immunity, Plaintiff attempts to add a new claim to her complaint through her Response Brief, that "the decision to terminate based on the purportedly poor performance was manifestly wrong on its face: the addition of the points, resulting in a 'below expectation' rating was incorrect." Plaintiff's new allegation is not relevant to either of the two causes of action cited in the First Amended Complaint and should be stricken from the record.

A. Substantive Due Process Claim

Defendants' Memorandum in Support of its Motion to Dismiss sets forth in detail the legal principles of qualified immunity and the three prong test utilized to

determine whether a state official sued in his personal capacity is entitled to qualified immunity. *See Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993).

Plaintiff's objection to Defendants' claim of qualified immunity appears to be based upon the first prong of the three-part *Arnzen* test: "Was there a clearly established law?" Plaintiff contends that because "[o]n April 22, 1993, permanent classified employees enjoyed and possessed a property interest in their employment," Defendants are not entitled to qualified immunity. Plaintiff's Response, p.7. However, what Plaintiff fails to recognize is the state Personnel Commission rule in existence in 1993 provided that the entrance probationary period, beyond which one became a permanent employee, had been set by the Personnel Commission at "one thousand forty (1040) hours of credited state service." IDAPA 28.15.A.2.a. (redesignated at IDAPA 28.01.01.150.02.a.).

Under the Personnel Commission rule setting the probationary period at 1,040 hours of credited state service, Plaintiff was still a probationary employee at the time of her evaluation and termination. Furthermore, as a probationary employee, Plaintiff did not have a property right in her employment. *See Hansen v. White*, 114 Idaho 907, 912, 762 P.2d 820, 825 (1988) (an employee during the probationary period may be terminated without cause); *Arnzen v. State*, 123 Idaho 899, 904, 854 P.2d 242, 247 (1993) (in order for an employee to have a property interest in continued employment, he must have been more than an employee at will). *See also McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (Supreme Court has not extended substantive due process protection to areas in which substantive rights are created only by state law,

such as employment law, because substantive due process rights are created only by the Constitution, citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S. Ct. 507, 515 (1985)).

Plaintiff also contends that Defendants can "take no solace" in the *Hood v. Idaho Department of Health and Welfare*, 125 Idaho 151, 868 P.2d 479 (1994), decision, which overturned the 1040-rule as inconsistent with the underlying statute's six-month mandate, "as a shield from liability." However, Plaintiff's argument is without merit. the Supreme Court in *Hood* specifically stated:

> Although we have concluded that the commission acted outside its authority by setting the probationary period at 1,040 hours of credited state service, we conclude that *the department did not act unreasonably in following the commission's invalid rule* and relying on the commission's decision.

125 Idaho at 154; 868 P.2d at 482 (emphasis added).

As Defendants noted in their Memorandum in Support of their Motion to Dismiss, the third prong of the *Arnzen* test is, "Was Defendant's conduct reasonable?" The Idaho Supreme Court, when addressing this very issue, found in *Hood* that the "department did not act unreasonably in following the commission's invalid rule." Thus, in the instant case, it follows that Defendants' conduct was reasonable in following the Personnel Commission's rule defining the probationary period at 1,040 hours of credited state service. As the Supreme Court of the United States explained in *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991), defendants are entitled to qualified immunity if their

decisions were reasonable, even if later shown to be mistaken. 502 U.S. at 228-29, 112 S. Ct. at 536-37. *See also Anderson v. Creighton*, 483 U.S. 635, 638-41, 107 S. Ct. 3034, 3038-40, 97 L. Ed. 2d 523 (1987).

Under the *Arnzen* three-prong analysis, state officers are entitled to the defense of qualified immunity if: (1) there was [not] a clearly established law to the contrary; (2) the defendant's conduct did not violate a clearly established right of plaintiffs; and (3) the defendant's conduct was reasonable. 123 Idaho at 904, 854 P.2d at 247. Defendants in the instant case have shown: (1) in 1993 the probationary period set by Personnel Commission rule was 1,040 hours of credited state service; (2) that at the time Plaintiff was evaluated, she had 950.90 hours of credited state service and Plaintiff was provided each and every one of the rights she was entitled to with regards to termination as a probationary employee; and (3) that Defendants' conduct in terminating Plaintiff according to this rule governing probationary employees was reasonable. Defendants have satisfied the three-prong test of *Arnzen* and, therefore, are entitled to the defense of qualified immunity. Plaintiff's lawsuit should be dismissed.

B. Procedural Due Process Claim

As stated above, Defendants acknowledge that Plaintiff filed a grievance of her performance evaluation within five (5) days receipt of the evaluation. However, even assuming that clearly established law in 1993 allowed Plaintiff to file a grievance of her performance evaluation, Defendant's conduct in not responding to her grievance did not violate a property right protected

under federal law because as a probationary employee, Plaintiff had no property right in her employment. *See Hansen v. White*, 114 Idaho 907, 912, 762 P.2d 820, 825 (1988) (an employee during the probationary period may be terminated without cause); *Arnzen v. State*, 123 Idaho 899, 904, 854 P.2d 242, 247 (1993) (in order for an employee to have a property interest in continued employment, he must have been more than an employee at will). *See also McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (Supreme Court has not extended substantive due process protection to areas in which substantive rights are created only by state law, such as employment law, because substantive due process rights are created only by the Constitution, citing *Regents of Univ. of Mich. v Ewing*, 474 U.S. 214, 229, 106 S. Ct. 507, 515 (1985)). For example, although a probationary employee may grieve that the employee does not like the furniture or the color of the walls in her office, that employee does not have a property right in office decor. Similarly, in the instant case, because Plaintiff was a probationary employee, she had no property right in her employment and therefore, the Defendants, in not responding to her grievance, did not violate a "clearly established right" of Plaintiffs.

Under the *Arnzen* analysis, the Defendants are entitled to the defense of qualified immunity on Plaintiff's procedural due process clause because even under the clearly established law allowing probationary employees to file grievances, the Defendants conduct in not responding to the grievance did not deprive her of property without due process of law.

III.

THE IDAHO STATE LIQUOR DISPENSARY IS NOT A "PERSON" SUBJECT TO SUIT UNDER 42 U.S.C. § 1983

Plaintiff acknowledges in her Response to Defendants' Motion to Dismiss that both state and federal precedent prohibit suit against the state (or its entities) and is not defined as a "person" for section 1983 purposes. Plaintiff further consents to the dismissal of the Dispensary from the action. However, Plaintiff conditions her consent for such dismissal on this Court's agreement to grant Plaintiff leave to amend the Complaint to name the Superintendent of the Dispensary in his official capacity.

Because both state and federal law is clear that suit against the state or its entities is prohibited under a section 1983 claim, the Idaho State Liquor Dispensary should be dismissed from this suit regardless of whether this Court grants Plaintiff leave to amend her complaint. Because Plaintiff's request for leave to amend the complaint is not properly before the Court at this time, Defendants reserve all objections to such an amendment.

DATED this 18 day of December, 1995.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Nicole S. McKay
Nicole S. McKay
Deputy Attorney General

(Certificate Of Service Omitted In Printing)

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IN THE DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KRISTINE L. FANKELL,

PLAINTIFF,

VS.

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY,

DEFENDANTS

CASE NUMBER:
CV95-00529

ORDER

(Filed
Feb. 23, 1996)

Pursuant to Defendant's Motion to Dismiss previously filed herein, this matter came on for hearing on the 13th day of February, 1996, wherein the Plaintiff appearing by and through her Attorney of Record, James A. Raeon, and the Defendant appearing by and through its

Attorney of Record, Nicole McKay, Deputy Attorney General, and after a review of the record and files herein, the Motions and Briefs submitted in Support thereof;

NOW, THEREFORE,

IT IS FURTHER HEREBY ORDERED that the Defendant's Motion to Dismiss, which was considered by this Court as a Motion for Summary Judgment, is hereby denied.

IT IS FURTHER HEREBY ORDERED that the Idaho State Liquor Dispensary is dismissed as a party Defendant in the above entitled action.

DONE AND ENTERED this 22 day of February, 1996.

/s/ J.R. Michaud
JAMES R. MICHAUD
DISTRICT JUDGE

(Certificate Of Service Omitted In Printing)

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ATTORNEY GENERAL

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Attorneys for Defendants

**IN THE DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT STATE OF IDAHO,
IN AND FOR THE COUNTY OF BONNER**

KRISTINE L. FANKELL, Plaintiff/Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants/Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendants.	Case No. CV-95-00529 **NOTICE OF APPEAL** (Filed April 4, 1996)

TO: THE ABOVE NAMED RESPONDENT, KRISTINE L. FANKELL, AND THE PARTY'S ATTORNEYS, JAMES A. RAEON, P.O. BOX 1237, COEUR d'ALENE, ID., 83816, AND WILLIAM B. LATTA, JR., P.O. BOX 2192, BOISE, ID., 83701-2192, AND THE CLERK OF THE COURT, NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants Marion Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers, appeal against the above named respondent to the Idaho Supreme Court from that portion of the Order denying these Defendants' Motion to Dismiss, considered by the Court as a Motion for Summary Judgment, rejecting their defense of qualified immunity under 42 U.S.C. § 1983, entered in the above entitled action on the 23rd of February, 1996, Honorable Judge Michaud presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to the long-standing case law of qualified immunity under 42 U.S.C. § 1983, most recently affirmed in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The U.S. Supreme Court in *Behrens* held that a government official asserting a defense of qualified immunity under 42 U.S.C. § 1983 has an immediate right of appeal of an unfavorable immunity ruling upon either a motion to dismiss or a motion for summary judgment.

3. The reporter's transcript is not requested.

4. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: All briefs and memorandums in support or opposition to Defendant's Motion to Dismiss.

5. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b) That the appellant is exempt from paying an estimated transcript fee because no transcript has been requested.

(c) That the appellants are exempt from paying the estimated fee for the preparation of the clerk's record because the State of Idaho and its officers are exempt from paying fees for the preparation of the clerk's record.

(d) That the appellants are exempt from paying the appellate filing fee because the State of Idaho and its officers are exempt from paying appellate filing fees.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 4 day of April, 1996.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Nicole S. McKay
Nicole S. McKay
Deputy Attorney General

(Certificate Of Service Omitted In Printing)

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, v. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, IDAHO SATE LIQUOR DISPENSARY, Defendants.	)	ORDER DISMISSING APPEAL NO. 22880 Ref. No. 96S-107 (Filed April 23, 1996)

The NOTICE OF APPEAL is from an Order Denying a Motion for Summery [sic] Judgment, which is not appealable under I.A.R. 11; however, the Appellants state in the Notice of Appeal that it is appealable under 42 U.S.C. §1983 and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed. 2d 773 (1996). The Court has reviewed the Notice of Appeal and statement by Appellants; therefore, after due consideration,

IT HEREBY IS ORDERED that the NOTICE OF APPEAL be, and hereby is, DISMISSED for the reason it is not from a final order or Judgment.

DATED this 23rd day of April, 1996.

By Order of
the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge James r. Michaud

ALAN G. LANCE
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Attorneys for Defendants

IN THE SUPREME COURT OF IDAHO

KRISTINE L. FANKELL, Plaintiff/Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants/Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendants.	)	Appeal No. 22880 **DEFENDANTS-APPELLANTS' PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL AND MEMORANDUM SUPPORTING PETITION FOR REHEARING** (Filed May 2, 1996)

Defendants-Appellants, by and through their attorney of record, Michael S. Gilmore, Deputy Attorney General, petition for rehearing from the Court's order of April 23, 1996, dismissing their appeal. This petition for rehearing presents a single legal issue for the court's consideration:

Issue on Petition for Rehearing

When a plaintiff's complaint is based in whole or in part upon claims under 42 U.S.C. § 1983, and the defendants move to dismiss under Rule 12(b)(6) and/or move for summary judgment based in whole or in part upon their claim of qualified immunity under 42 U.S.C. § 1983, is the trial court's order denying the motion to dismiss and/or motion for summary judgment a final order appealable as a matter of right with regard to the issue of denial of a claim of qualified immunity?

Statement of Facts

Kristine L. Fankell, the Plaintiff-Respondent in this case, filed a Complaint against persons including the Defendants-Appellants Marian Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers. See Exhibit 1. That Complaint was grounded in allegations of violations of 42 U.S.C. § 1983, in particular, in deprivation of property without due process of law. *Id.* at ¶¶ 2, 22 and 28. Defendants-Appellants moved to dismiss the Complaint pursuant to I.R.C.P. 12(b)(6). See Exhibit 2. Among other things, Defendants' memorandum in support of their motion to dismiss asserted their defense of qualified immunity under 42 U.S.C. § 1983. See Exhibit 3, pp. 2, 6-13.

The district court treated Defendants-Appellants' motion as a motion for summary judgment under Rule 56 rather than a motion to dismiss under Rule 12(b)(6). On February 23, 1996, the clerk of the court entered the district court's order denying the Defendants-Appellants' motion. See Exhibit 4. On April 4, 1996, the Defendants-

Appellants filed a timely Notice of Appeal. See Exhibit 5. Paragraphs 1 and 2 of that Notice of Appeal provided the following:

> 1. The above named appellants Marion Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers, appeal against the above named respondent to the Idaho Supreme Court from that portion of the Order denying these Defendants' Motion to Dismiss, considered by the Court as a Motion for Summary Judgment, rejecting their defense of qualified immunity under 42 U.S.C. § 1983, entered in the above entitled action on the 23rd of February, 1996, Honorable Judge Michaud presiding.
>
> 2. That the parties have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to the long-standing case law of qualified immunity under 42 U.S.C. § 1983, most recently affirmed in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The U.S. Supreme Court in *Behrens* held that a government official asserting a defense of qualified immunity under 42 U.S.C. § 1983 has an immediate right of appeal of an unfavorable immunity ruling upon either a motion to dismiss or a motion for summary judgment.

On April 23, 1996, the clerk of the Supreme Court issued an Order Dismissing Appeal. See Exhibit 6. The body of the Order Dismissing Appeal said:

> The NOTICE OF APPEAL is from an Order Denying a Motion for Summery [sic] Judgment, which is not appealable under I.A.R. 11; however, the Appellants state in the Notice of

> Appeal that it is appealable under 42 U.S.C. § 1983 and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed. 2d 773 (1996). The Court has reviewed the Notice of Appeal and statement by Appellants' therefore, after due consideration.
>
> IT HEREBY IS ORDERED that the NOTICE OF APPEAL be, and hereby is, DISMISSED for the reason it is not from a final order or judgment.

The Defendants-Appellants contend in this petition for rehearing that the district court's order denying their motion is a final order to the extent that it has denied their claim of qualified immunity under 42 U.S.C. § 1983 and that they have a right to appeal that part of the order denying the claim of qualified immunity under Idaho Appellate Rule 11(a)(1). Alternatively, if they do not have that right, then they have a right to appeal that part of the order denying the claim of qualified immunity as a matter of federal law in order to prevent discrimination by a state court against a federal claim or defense.

Legal Argument

I. The District Court's order denying the defendants' motion for summary judgment is a final order to the extent that it denies a claim of qualified immunity under 42 U.S.C. § 1983, and defendants have a right to appeal the part of the order denying their claim of qualified immunity under I.A.R. 11(a)(1)

42 U.S.C. § 1983 is a federal statute. Suits brought under 42 U.S.C. § 1983 alleging a state employee's violation of a federal constitutional right present the same issues of liability and immunity as so-called *Bivens*

actions brought against federal employees directly under the federal constitution.[1] Qualified immunity is one of the defenses that may be asserted by state employees when they are sued under 42 U.S.C. § 1983. *Arnzen v. State*, 123 Idaho 899, 904-06, 854 P.2d 242, 247-49 (1993). The Supreme Court of the United States has equated the qualified immunity defenses available in cases brought under 42 U.S.C. § 1983 and *Bivens* cases:

> Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

Butz v. Economou, 438 U.S. 478, 504, 98 S. Ct. 2894, 2909, 57 L. Ed. 2d 895 (1978). See, also, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n. 30, 102 S. Ct. 2727, 2738, n. 30, 73 L. Ed.

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[1] *Bivens* actions are named after the decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

2d 396 (1982); *Malley v. Briggs*, 475 U.S. 335, 340, n. 2, 106 S. Ct. 1092, 1095, n. 2, 89 L. Ed. 2d 271 (1986).

As a matter of practice, courts do not distinguish between the immunities available under 42 U.S.C. § 1983 and in *Bivens* actions, citing opinions in both kinds of cases interchangeably in an explication of immunity law. See, *e.g.*, *Arnzen*, 123 Idaho at 904, 854 P.2d at 247, which cites *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (*Bivens* claim against federal officer), *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (*Bivens* claim against federal officer), *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (*Bivens* claim against federal agent), and *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (section 1983 claim against state officer), in explication of qualified immunity defenses under 42 U.S.C. § 1983.

Denials of qualified immunity are immediately appealable as final orders. In the recent case of *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996), the Supreme Court of the United States explained the significance of a qualified immunity defense in a *Bivens* case and that denial of a claim of qualified immunity in such a case is a final, appealable decision, be the denial at the stage of a Rule 12(b)(6) motion or a motion for summary judgment. Of course, its comments on finality are also applicable to the case now before the Court, which is brought under 42 U.S.C. § 1983:

> Section 1291 of Title 28, U.S.C., gives courts of appeals jurisdiction over "all final decisions" of district courts. . . . It does not, however, bar review of all prejudgment orders. In *Cohen* [*v. Beneficial Industrial Loan Corp.*, 336 U.S. 541, 546, 69 S. Ct. 1221, 1225, 93 L. Ed. 2d 1528 (1949),] we described a "small class" of district court decisions that, though short of final judgment, are immediately appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself that it requires that appellate consideration be deferred until the whole case is adjudicated." *Ibid.* . . . The issue in the present case is the extent to which orders denying governmental officers' assertions of qualified immunity come within the *Cohen* category of appealable decisions.
>
> As set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), the qualfied-immunity defense "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *id.*, at 818, 102 S. Ct. at 2738 (citing *Procunier v. Navarette*, 434 U.S. 555, 565, 98 S. Ct. 855, 861, 55 L. Ed. 2d 24 (1978)). *Harlow* adopted this criterion of "objective legal reasonableness," rather than good faith, precisely in order to "permit the defeat of insubstantial claims without resort to trial." 457 U.S., at 879, 813, 102 S. Ct., at 2739, 2735-2736. Unsurprisingly, then, we later found the immunity to be "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question." *Mitchell v. Forsyth*, [472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985)]. And, as with district-court rejection of claims to other such entitlements distinct

> from the merits, see, *e.g.*, *Puerto Rico Aqueduct [and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-146, 113 S. Ct. 684, 688-689, 124 L. Ed. 2d 605 (1993)] (Eleventh Amendment immunity); *Abney v. United States*, 431 U.S. 651, 662, 97 S. Ct. 2034, 2041-2042, 52 L. Ed. 2d 651 (1977) (right not to be subjected to double jeopardy), we held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell, supra*, at 530, 105 S. Ct., at 2817. See also *Johnson v. Jones*, 515 U.S. ___, ___, 115 S. Ct. 2151, 2155-2156, 132 L. Ed. 2d 238 (1995).

___ U.S. at ___, 116 S. Ct. at 838-39. As the Court clarified: "*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary-judgment stage is a 'final' judgment subject to immediate appeal." ___ U.S. at ___, 116 S. Ct. at 839.

Drawing upon these precedents, the Supreme Court concluded that the defendants were entitled to bring successive appeals – the first from the denial of their motion to dismiss under Rule 12(b)(6) on the basis of qualified immunity, and the second from the denial of their motion for summary judgment on the basis of qualified immunity – because each decision was final from the point of view of the defendant claiming immunity, *i.e.*, each was a final determination whether the defendant would be subject to discovery or trial, which are the two things that immunity would shield the defendants from.

___ U.S. at ___, 116 S. Ct. at 839-41.[2] That the decision in *Behrens*, which is a *Bivens* case, would also apply to a § 1983 case is apparent by the Court's unqualified discussion of the rules of appeal of qualified immunity defenses in the case of *Johnson v. Jones*, 515 U.S. ___, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), a case decided under § 1983. ___ U.S. at ___, 116 S. Ct. at 842.

To be sure, the cases previously cited, whether § 1983 cases or *Bivens* cases, were decided under federal procedural statutes, and one might argue that the cases stand for nothing more than a construction of federal law concerning finality for purposes of appeal. Were the right to appeal from a denial of a 12(b)(6) motion to dismiss on the basis of qualified immunity or the right to appeal from the denial of a motion for summary judgment on the basis of qualified immunity merely a procedural right alone, Defendants-Appellants would accept that premise. But, the cases cited make it clear that the right protected is more than procedural – it is substantive:

> *Mitchell* bears particularly on the present case. There, the Attorney General of the United States appealed from a district court order denying his

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[2] The appellate court's review of the trial court's decision denying qualified immunity does not prevent issues unrelated to qualified immunity proceeding to trial. *Cf. Behrens*, ___ U.S. at ___, 115 S. Ct. at 841. Whether the entire case should be stayed while awaiting appellate review of the qualified immunity defense or the remainder of the case should proceed to trial is a matter within judicial discretion. But, the right to appellate review of issues associated with denial a claim of qualified immunity cannot be defeated by the defendants' obligation to stand trial on unrelated issues. ___ U.S. at ___, 115 S. Ct. at 841-42.

> motion to dismiss on grounds of qualified immunity. The court of appeals held that the order was not appealable and remanded the case for trial. We reversed, holding that the order denying qualified immunity was a collateral order immediately appealable under *Cohen*. We found that absent immediate appeal, the central benefits of qualified immunity – avoiding the costs and general consequences of subjecting public officials to the risk of discovery and trial – would be forfeited. . . . "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell, supra,* at 526, 105 S. Ct., at 2815 (emphasis is original).

Puerto Rico Aqueduct, 506 U.S. at 143-44, 113 S. Ct. at 687 (footnote omitted).

The right to be spared the time and expense of discovery or trial under a claim of qualified immunity is a substantive benefit. The right to appeal from the denial of a 12(b)(6) motion on grounds of qualified immunity or to appeal from the denial of a motion for summary judgment on grounds of qualified immunity is a final order regarding that substantive right. The Defendant-Appellants' appeal is squarely within the list of appealable orders in Idaho Appellate Rule 11(a)(1):

> **Rule 11. Appealable judgments and orders.** – An appeal as a matter of right may be taken to the Supreme Court from the following judgments and orders:
>
> (a) Civil Actions. From the following judgments and orders of a district court in a civil case:

> (1) Judgments, *orders* and decrees *which are final,* including orders of the district court granting or denying peremptory writs of mandate and prohibition.

Emphasis added. Because the order denying a claim of qualified immunity[3] not to stand trial for a claim brought under 42 U.S.C. § 1983 is a final order, it is appealable under I.A.R. 11(a)(1).

II. If the Defendants-Appellants have no right under I.A.R. 11(a)(1) to appeal the part of the district court's order denying their claim of qualified immunity, then they have a right to appeal that part of the order denying the claim of qualified immunity as a matter of federal law to prevent state court discrimination against a federal claim or defense

State courts must apply the federal rules of substantive law in a case brought under 42 U.S.C. § 1983. This is clear from the case of *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). In *Howlett* Florida citizens sued local school board members and school officials in state courts under 42 U.S.C. § 1983. Despite the precedent that local governments like municipalities or school boards were persons subject to suit under 42 U.S.C. § 1983, see *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Florida courts held that Florida had not

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[3] This same argument on appealability of orders denying claims of qualified immunity would apply to claims of the absolute immunity defenses recognized under 42 U.S.C. § 1983: *e.g.*, legislative immunity, judicial immunity, prosecutorial immunity, testimony immunity.

waived a municipality's sovereign immunity from suit under 42 U.S.C. § 1983, so the Florida state courts would not entertain suits against municipalities under that statute. The Supreme Court of the United States reversed. In doing so, it explicated the relationship between state courts, state law, and federal law under 42 U.S.C. § 1983, noting that the Florida District Court of Appeal's "holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action." 496 U.S. at 366, 110 S. Ct. at 2437. The Court elaborated:

> Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the State as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.
>
> . . . .
>
> Three corollaries follow from the proposition that "federal" law is part of the "Law of the Land" in the State:
>
> 1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a "valid excuse." [Citation omitted.] "The existence of the jurisdiction creates an implication of duty to exercise it." [Citations omitted.]
>
> 2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The

> Supremacy Clause forbids state courts to dissociate themselves from federal law because a disagreement with its content or refusal to recognize the superior authority of its source. . . .
>
> 3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. [Citations omitted.] The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. . . . In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law. [Citations omitted.]

496 U.S. at 367-72, 110 S. Ct. at 2438-41 (footnote omitted).

There were only three cases in which the Supreme Court of the United States accepted a state court claim that its neutral rules of procedure or jurisdiction prevented the state court from exercising jurisdiction over a federal claim according to federal law: where state statute permitted discretionary dismissal of both federal and state claims when neither plaintiff nor defendant were resident of the state, *Douglas v. New York, N.H. & H.R. Co*, 279 U.S. 377, 49 S.Ct 355, 73 L.Ed. 747 (1929); where a city court was denied jurisdiction of both state and federal claims that arose outside its territory, *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1940); and where a state court applied a neutral doctrine of *Forum non conveniens, Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S.

1, 71 S.Ct. 1, 95 L.Ed.3 (1950). 496 U.S. at 474-75, 110 S.Ct. 15 2442. None of those situations are present here.

Idaho does not prohibit its courts at either the trial or appellate level from considering claims brought under 42 U.S.C. § 1983. Idaho Appellate Rule 11 explicitly authorizes certain appeals from orders preceding final judgment, including those from "[a]n order granting . . . a new trial, including such orders which contain a conditional grant . . . of a new trial subject to additur and remittitur," I.A.R. 11(a)(5); "[a]ny order however denominated, reducing a charge of criminal conduct over the objection of the prosecutor," I.A.R. 11(c)(5), or "[a]n order granting a motion to suppress evidence," I.A.R. 11(c)(8). Given the availability of appellate jurisdiction in Idaho under state law for certain kinds of orders preceding final judgments, the state cannot discriminate against federal claims or defenses by denying the Defendants-Appellants' federal right to appeal from the denial of their motion for summary judgment upon a claim of qualified immunity under 42 U.S.C. § 1983.

Summary

The Defendants-Appellants therefore pray that the Court reconsider its Order Dismissing Appeal and pray that the Court reinstate their appeal from the district court's denial of their motion for summary judgment based upon a claim of qualified immunity under 42 U.S.C. § 1983.

Dated this 2nd day of May, 1996.

State of Idaho
Office of the Attorney General

By /s/ Michael S. Gilmore
Michael S. Gilmore
Deputy Attorney General

(Certificate Of Service And
Attached Exhibits And Affidavit Omitted In Printing)

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, v. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, and IDAHO STATE LIQUOR DISPENSARY, Defendant.	)	ORDER DENYING PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL NO. 22880 Ref. No. 96S-108 (Filed May 23, 1996)

An ORDER DISMISSING APPEAL was issued April 23, 1996, for the reason the Notice of Appeal was not from a final order or judgment. A PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL AND MEMORANDUM SUPPORTING PETITION FOR REHEARING with attachments and AFFIDAVIT OF COUNSEL was filed by Appellants May 2, 1996. The Court is fully advised; therefore, after due consideration,

IT HEREBY IS ORDERED that the PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL be, and hereby is, DENIED and this appeal is DISMISSED with the Remittitur to issue forthwith.

DATED this 23rd day of May, 1996.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge James R. Michaud

IN THE SUPREME COURT
OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, v. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, and IDAHO STATE LIQUOR DISPENSARY, Defendant.	)	REMITTITUR NO. 22880 (Filed May 23, 1996)

TO: FIRST JUDICIAL DISTRICT COURT, BONNER COUNTY.

The Court having entered an Order dismissing this appeal on May 23, 1996; therefore,

IT IS HEREBY ORDERED that the appeal herein from the Judgment of the District Court be, and is hereby dismissed, no costs taxed.

DATED this 23rd day of May, 1996.

/s/ Carmen Bird
Clerk of the Supreme Court
STATE OF IDAHO